



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

APR 22 2010

Douglas J. Wade
U.S. Army Corps of Engineers
Attn: CECW-CE
441 G Street, N.W.
Washington, D.C. 20314-1000

Re: Docket number – COE-2010-0007

Dear Mr. Wade:

The National Marine Fisheries Service (NMFS) appreciates the opportunity to review and comment on the U.S. Army Corps of Engineers (COE) proposed process for requesting a variance from vegetation standards for levees and floodwalls (75 FR 6364). After reviewing the draft process NMFS recommends that the COE modify the proposed process because implementation of the new procedure as drafted could cause adverse impacts to NMFS trust resources. Our comments, attached to this letter, identify significant issues that NMFS recommends the COE address in future iterations of the Engineering Technical Letter and variance procedures. NMFS would be pleased to further discuss these topics with the COE.

Thank you for your consideration of our comments.

Sincerely,

James H. Lecky
Director
Office of Protected Resources

Attachment



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National Marine Fisheries Service Comments on 75 FR 6364 (02/09/10) Department of the Army, Corps of Engineers – Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls, April 23, 2010

1. NMFS is concerned that the proposed revision will delay or impair recovery of Endangered Species Act (ESA) listed species because the difficulty, uncertainty, and lengthiness of the proposed variance approval process will inhibit levee sponsors or levee owners from applying for variance under the new system.

Where a variance was previously in effect, vegetation is likely to be removed by levee owners/sponsors to meet national Rehabilitation and Inspection Program (RIP) inclusion standards, reducing functional riparian conditions and water quality conditions for listed fish, adversely impacting both habitat and listed species.

Where a variance was not previously in place, non-functional levels of vegetation will become a persistent condition, precluding natural re-establishment of (and/or restoration activities creating) riparian and water quality habitat conditions that are pre-requisite to improving juvenile-to-adult survival in freshwater and estuarine life-stages.

2. The proposed revision does not indicate what vegetation criteria will be required for levees during the new proposed variance review/approval process that appears to have indefinite time-frames (particularly levees that had previous variance) (part 10). NMFS recommends that the COE retain existing variance criteria during the new variance review process and NOT default to basic ER 500-1-1/EP500-1-1 2" diameter at breast height (dbh) standard, to afford the highest available riparian function in the interim period.

3. The proposed regulatory changes should be supported by the scientific literature. NMFS recommends the final process (or supporting environmental compliance documentation) describe the scientific literature that the COE considered when creating "blanket" vegetation restrictions identified in the variance process (e.g. no wood on upper third, landside slope, or 15 feet landward of landside toe; planting berms/benches need variance).

4. The FR Notice for new ETL 1110-2-571 (guidelines for landscape planting and vegetation management at levees, floodwalls etc) states that existing variances need to be approved through this new policy letter, which supersedes variance policy and process contained in ER 500-1-1 (standards for inclusion in RIP) and EP 500-1-1 (RIP civil emergency management), but does not indicate what the status will be of any existing variances during the new review process. NMFS recommends that the COE plainly state that the existing level of vegetation will be acceptable pending review unless clear science indicates an unacceptable level of risk for a particular levee.

5. NMFS recommends the COE allow variances at larger than "individual scale" or "portion" (part 9.a.) for two reasons:

- a. Existing variance process and existing variances allow for a broader

geographic scale. The new small-scale variance requirement will be procedurally burdensome to re-establish the pre-existing level of on-the-ground variances.

- b. Shifting the ESA and NEPA environmental review obligations to an individual variance by variance scale forces the review of environmental effects on species, habitat, and natural resources into a piecemealed analysis, rather than comprehensive analysis.

6. Because the proposed variance review timeline is indefinite, it will create confusion and uncertainty for local sponsors seeking approval of a requested variance. There are no specified timelines for each step of review, except the 90 day limit for the Agency Technical Review, which appears to be step 4. NMFS suggests that each review and recommendation step, and each review and approval step should indicate a clear timeframe. Additionally, the proposed sequence for obtaining a variance is overly burdensome – it has five review steps within the COE. The proposed variance review process also lacks clear appeal opportunities and a defined appeal process.

7. The proposed threshold standard for variance approval appears to be unachievable. A variance in the vegetation standard must be shown to be “*the only feasible means*” to protect/preserve/enhance natural resources or protect rights of Native Americans pursuant to treaty/statute/executive order.” The very high threshold is likely to hinder potential requests for variance, create confusion in applicant efforts to meet the standard for variance request submittals, and cause delays while debate ensues between applicant and COE reviewers on correct interpretation.

8. The proposed rule would appear to establish an impracticable procedural sequence on the part of local sponsors because it requires a demonstration of NEPA and ESA compliance on the part of levee variance sponsors to be included with submission of a variance request. Such an inclusion is impracticable under the ESA because levee sponsors are unlikely to seek to request a NMFS ESA section 10 permit/Habitat Conservation Plan (HCP) for enhanced vegetation management as a means of demonstrating the requisite ESA compliance because such a permit would be based on a vegetation management regime that is uncertain to receive COE approval.

9. NMFS does not agree with the COE finding of no significant impact based on an environmental assessment and recommends that the COE prepare an EIS. Federal agencies typically prepare an EIS when an action has the potential to significantly affect the quality of the human environment. Significance in NEPA is determined from the context and intensity of the effects of the proposed action. The intensity of effects is determined from, among other things, unique characteristics of affected areas, degree of controversy, unique or unknown risks, precedent-setting effects, and effects on species with special status, including those listed as threatened or endangered under the ESA (40 CFR 1508.27). NMFS believes that each of these criteria is met under the current proposal. The environmental effects of the proposal are regionally controversial, bear directly on listed species and their habitat, establish new procedural precedents, and involve a degree of uncertainty with respect to risk.

10. NMFS also has concerns regarding several of the terms used in the process:

"Only Feasible Means" (parts 6.a.1, 7.a.) – This standard is difficult to interpret and it is unclear how that standard could be met.

"Substantial Deviation" (part 7.a.) – This standard is subjective. How is this measured or identified?

"Reasonable Alternatives" (part 7.c.1) – Even with the example provided, this boundary restriction is difficult to interpret. What is a "reasonable alternative" to a variance on the vegetation standard?

"Engineering Analysis" (part 7.e.) – This requirement is ill-defined. Who is authorized to provide this analysis?

"208.10.408 Review" (part 9.h.) – The materials do not indicate what this requirement is, or what party is obliged to undertake it.

NMFS comments on the application of this process in Washington and California

Washington

NMFS recommends the COE exempt Washington State from this variance revision. In February 2009, the COE committed to participate in a pilot program consisting of alternative approaches to levee vegetation management in Washington State that better address salmon habitat needs without compromising public safety. These include ongoing cooperation between the NW Division and the Seattle District commander and the NMFS Northwest Region Washington State Habitat Office regarding levee management approaches that incorporate a higher level of conservation to address habitat needs of ESA listed salmon in Washington. Unfortunately, the pilot program has been delayed by a lack of funding from COE to support the Seattle District's involvement in the program. NMFS believes the proposed COE policy changes will impair, rather than aid, implementation of the pilot program.

Central Valley of California

1. The ecosystem value of vegetation on levees and in channels is significant because it represents much of the remaining Central Valley vegetation that existed before the Central Valley was settled. Only about 2 percent of the historic riparian corridor remains along 1600 miles of Central Valley levee corridors. Vegetated levees and channels provide valuable habitat to many fish and wildlife species listed or managed under the ESA and the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In many areas, the vegetated levee corridors are designated critical habitat under the ESA, and Essential Fish Habitat under the MSA. Within California's Central Valley, threatened or endangered species, or species of concern, under NMFS jurisdiction include Sacramento River winter-run Chinook salmon,

Central Valley spring-run Chinook salmon, Central Valley fall- and late fall-run Chinook salmon, Central Valley steelhead, southern distinct population segment of the North American green sturgeon. The status of these salmon populations has been in sharp decline over the past five years. Although the best available information indicates that ocean conditions were the primary causal factor triggering the recent decline, the long-standing and ongoing degradation of freshwater and estuarine habitats also have been identified as likely contributors to the collapse of the stock.

Under the Draft Variance Guidelines it appears that much of the remaining existing vegetation will be removed, and the ability to improving riparian habitat along important migratory corridors for NMFS trust resources will be reduced, and cause the continued degradation of freshwater and estuarine habitat and result in significant harm to anadromous fish.

2. The Draft Variance Guidelines represent a one-size-fits-all approach to levee vegetation that does not recognize the unique levee conditions in California where vegetation is extensive in area and ecosystem importance; or incorporate the innovative regional solutions that have been undertaken in collaboration with the COE Division and District Offices, the State of California, the California Department of Fish and Game (DFG), NMFS and the U.S. Fish and Wildlife Service (USFWS) for the past 5 years.

This collaboration resulted in California's Central Valley Flood System Improvement Framework (Central Valley Framework). The Central Valley Framework establishes interim criteria for levee vegetation that allows the majority of riverside vegetation to remain in place while the State of California aggressively pursues the development of the Central Valley Flood Protection Plan (CVFPP) by 2012. The Central Valley Framework allows the Central Valley State-federal levee system to maintain eligibility under the Flood Control and Coastal Emergency Act (PL 84-99) until the CVFPP is developed, at which time the eligibility will be re-evaluated based on the content of the CVFPP and conclusions of ongoing State and Federal research on the long-term risks and benefits of levee vegetation.

The innovative regional solutions within the Central Valley Framework are designed to meet multiple objectives including flood risk reduction and resource protection and enhancement. The COE Draft Variance Guidelines represent a significant departure from these successful collaborative efforts.

3. The Draft Variance Guidelines state that existing variances, agreements, or other deviations that are not submitted for approval by September 30, 2010, may no longer be considered valid. It is not clear if the Central Valley Framework (which is considered an extension of PL 84-99 eligibility) falls into this requirement.
4. Neither Public Law (PL) 84-99, nor Section 202(g) of the Water Resources Development Act (WRDA) of 1996, mandate the wholesale removal of vegetation. Section 202(g) of WRDA requires the COE to examine its policies in view of the

interest in "preserving, protecting, and enhancing natural resources" and also requires that the resulting guidelines "address regional variations." NMFS believes that the COE has considerable flexibility to craft a vegetation policy addressing the specific needs in California, as demonstrated in the Central Valley Framework.

Therefore, NMFS recommends that the State-federal flood protection system in California's Central Valley be exempted by the COE from application of their Variance Guidelines. NMFS proposes the following language for the COE consideration for regional flood system improvement programs:

Special Considerations:

Regional flood system improvement programs, including California's Central Valley Flood System Improvement Framework, the Central Valley Flood Protection Plan, and the Washington State Pilot Program with the Seattle District, and recently constructed Central Valley critical levee repairs that were constructed in 2006 and 2007 shall be considered exempt from the National vegetation policy and variance guidelines but must demonstrate and document ongoing and planned comprehensive system improvements, meet aggressive milestones that can be used to track progress, protect and conserve riparian habitat values, and demonstrate a commitment to flood system improvement in order to maintain eligibility for federal rehabilitation aid for levees under PL 84-99.

5. The Draft Variance Guidelines do not adequately address existing vegetation, only new planting. Specifically, the guidance states that it is not a mechanism to validate conditions that have developed as a result of inadequate operation and maintenance (e.g., large riparian trees growing on or near levees). Given the ecosystem value of these large trees, we believe this is a major shortcoming in the Draft Variance Guidelines. Without a mechanism in the Draft Variance Guidelines to protect existing riparian vegetation along levees in the Central Valley, there is significant potential for large scale riparian habitat removal; especially after 2012 when the Framework expires. NMFS recommends that the variance include provisions for allowing existing vegetation to remain consistent with the interim inspection criteria described in the Central Valley Framework.
6. Extensive levee vegetation research is being conducted by the State of California and COE. The results of this research are intended to inform policy regarding the risks and benefits of the levee vegetation, yet the Draft Variance Guidance does not clarify how this might occur. The Variance Guidance should allow for the integration of scientific conclusions into variances or other long-term levee policies such as the Central Valley Flood Protection Plan.
7. The Draft Central Valley Salmon and Steelhead Recovery Plan identifies loss of the riparian corridor as a highly ranked stressor affecting species survival and recovery. Riparian enhancement of the corridor is a high priority recovery action, and the Draft Variance guidelines would complicate and likely preclude implementation, and

significantly impair the ability to recover salmon and steelhead populations in the Central Valley.

8. Implementation of the Draft Variance Guidelines in California may result in approximately 54,359 feet of critical State and Federal levee repairs and approximately 40,362 linear feet of COE PL 84-99 projects being out of compliance with existing ESA biological opinions. An additional 57,412 linear feet of planned COE Sacramento River Bank Protection Project actions will be non-compliant with the ETL and the Draft Variance Guidelines.